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No. 01-236

Supreme Court, U.S.
FILED
SEP 12 2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

MICROSOFT CORPORATION,

Petitioner,

—v—

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICROSOFT'S REPLY BRIEF

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List of Parties and Rule 29.6 Statement

There have been no changes in the information previously submitted by Microsoft pursuant to Rule 29.6 in its petition for a writ of certiorari.

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MICROSOFT'S REPLY BRIEF

The violations of 28 U.S.C. § 455(a) in this case "were deliberate, repeated, egregious, and flagrant" (A119) and began two months before the district judge issued his findings of fact and six months before he issued his conclusions of law (A122). The court of appeals nonetheless declined to order a new trial primarily because it discerned no evidence of actual bias (A136, A138-39)—a factor not relevant under Section 455(a), which addresses the *appearance* of partiality. The decision below cannot be reconciled with decisions of other circuits that have ordered new trials for far less egregious violations of Section 455(a), despite the absence of actual bias. Indeed, the violations here were so profound that it is difficult to imagine a case in which a new trial would be more appropriate. This Court should grant review now before further proceedings occur on remand in reliance on tainted findings of fact and conclusions of law that must be vacated.

1. Immediate review is appropriate notwithstanding the interlocutory nature of the judgment. Whether the court of appeals improperly relied on the absence of actual

bias in determining the extent of disqualification is an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.18, at 196 (7th ed. 1993). This Court therefore should review that issue now. If the Court ultimately concludes that the findings must be vacated, any actions taken on remand in reliance on them would be invalid. Respondents do not contend otherwise. Both judicial economy and respondents' stated interest in saving "taxpayer dollars" (DOJ Opp'n at 20) would best be served by resolving the disqualification issue before the parties and lower courts expend more time and resources on proceedings that will need to be conducted anew if the findings are vacated. Equally important, further proceedings on remand will neither clarify nor potentially eliminate the question presented. The disqualification issue has been finally decided and is ripe for review.

2. The absence of actual bias was the most important factor in the decision not to vacate the findings of fact. Respondents seek to downplay the significance the court of appeals ascribed to actual bias, claiming that it was only one of several factors considered in devising a remedy for the violations of Section 455(a). DOJ Opp'n at 17; States Opp'n at 9. It was not just one factor; it was the decisive factor.

To be sure, the court of appeals also noted that vacating the findings "would unduly penalize plaintiffs, who were innocent and unaware of the misconduct, and would have only slight marginal deterrent effect." (A135) But the same can be said of almost every case. There is no authority for the proposition that vacatur of prior rulings is appropriate only when the prevailing party was complicit in the judicial misconduct. "[J]udges are routinely reversed for error that is not the fault of either party." Ronald D. Rotunda, *Judicial Comments on Pending Cases: Ethical Restrictions and the Sanctions—A Case Study of the Microsoft Litigation*, 2001

U. ILL. L. REV. 611, 627 (2001). Similarly, "any extra step taken to enforce" Section 455(a) beyond prospective disqualification will usually have only incremental deterrent effect "in encouraging judges not to make the same mistake in the future." *In re Sch. Asbestos Litig.*, 977 F.2d 764, 785 n.27 (3d Cir. 1992). That does not mean, however, that the remedy for egregious and deliberate violations of Section 455(a) should be limited to prospective disqualification and vacatur of rulings already voided on other grounds.

The court of appeals expressly acknowledged that lack of actual bias was the "[m]ost important" factor in its decision. (A136) Respondents' effort to explain away this statement (DOJ Opp'n at 17 n.7) cannot be squared with the language of the opinion. The court also returned to actual bias in justifying its deference to the judge's findings despite the appearance of partiality. After conceding that "there is fair room for argument that the District Court's factfindings should be vacated *in toto*," the court accepted them because it "discerned no evidence of actual bias." (A138-39) The court also cited (A136) *Liberty Lobby, Inc.* v. *Dow Jones & Co.*, 838 F.2d 1287, 1301-02 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988), which held that retroactive disqualification is inappropriate "absent a showing of actual bias." Respondents have no credible explanation (States Opp'n at 13 n.1) for this citation to a decision that was overruled by *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988).[1]

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[1] Respondents note (DOJ Opp'n at 16; States Opp'n at 13) that the court of appeals, in denying Microsoft's motion to stay the mandate, stated that Microsoft appears to have misconstrued its opinion, but that opinion clearly placed the greatest weight on actual bias. Moreover, respondents' suggestion (DOJ Opp'n at 17; States Opp'n at 6) that the court ordered a "retroactive" disqualification because it vacated the decree is unpersuasive—the decree had already been vacated on three other grounds. Finally, the court of appeals expressly declined to address whether the instant petition presents a substantial question. DOJ App. A at 2a.

The effect of the court of appeals' heavy reliance on actual bias is to make it a prerequisite for retroactive disqualification, notwithstanding Congress's explicit determination that it is the *appearance* of bias—in this case, of an extreme nature—that is to govern the question of disqualification under Section 455(a). In contrast to the court of appeals' decision, the cases discussed below accord no weight to actual bias in determining the appropriate remedy under Section 455(a). *See also* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3553, at 657 (2d ed. 1984) (arguments "that in fact the judge acted in an impartial manner" are irrelevant in fashioning a remedy for violations of Section 455(a)).

3. Respondents' effort to limit *Liljeberg*, *Cooley* and *Preston* to their precise facts is unavailing. In *Liljeberg*, this Court identified three factors for courts to consider in determining the appropriate remedy for a violation of Section 455(a). 486 U.S. at 864. Actual bias was not among them. That omission is not surprising because Section 455(b)(1), *not* Section 455(a), applies when the judge "has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1); *see also* 28 U.S.C. § 144. Furthermore, the Court in *Liljeberg* affirmed the Fifth Circuit's decision to order a new trial *without even mentioning* that no claim of actual bias could be made in that case. 486 U.S. at 867-68. If the existence of actual bias was important in devising a remedy under Section 455(a), this Court presumably would have addressed it. Finally, the facts of this case stand in stark contrast to the example of a harmless error posited by the Court in *Liljeberg*. This is not a case in which a busy district judge "inadvertently overlook[ed] a disqualifying circumstance." *Id.* at 862. The violations here not only were deliberate and a dramatic departure from accepted standards of judicial behavior; they were deliberately concealed by the district judge for nine months until judgment was entered. (A119, A128)

Respondents argue that there is no conflict with *United States* v. *Cooley*, 1 F.3d 985 (10th Cir. 1993), or *Preston* v. *United States*, 923 F.2d 731 (9th Cir. 1991), because those decisions "involve factual circumstances markedly different from the decision below." DOJ Opp'n at 19; *see also* States Opp'n at 16-17. Yet respondents fail to identify a single factual distinction that justifies the very different result in this case.[2] To the contrary, the violations of Section 455(a) here are far more egregious than they were in *Cooley* and *Preston*, creating an even greater risk of injustice to Microsoft and more seriously undermining public confidence in the integrity of the judiciary. Thus, if anything, the "markedly" different facts of this case present even more compelling reason to order a new trial than the comparatively benign facts of *Cooley* and *Preston*—and provide even less justification for reliance on a lack of proof of actual bias as a basis for denying relief.

Respondents incorrectly assert that the court of appeals' decision is subject to review only for abuse of discretion. DOJ Opp'n at 20. In placing undue weight on a factor not relevant under Section 455(a)—actual bias—the court applied the wrong legal standard. Even if abuse of discretion review were appropriate here, however, the court's decision

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[2] Respondents assert that unlike *Preston*, the misconduct here "arose from the judge's reactions to the evidence presented in the case itself." DOJ Opp'n at 18 n.8; *see also* States Opp'n at 15. The court of appeals did not rely on this supposed distinction as a basis for limiting the scope of disqualification. In fact, the court stated that the "'extrajudicial source' rule has no bearing on the case before us." (A133) Respondents' assertion is also factually inaccurate. The court of appeals found that the judge received *ex parte* information from reporters during his clandestine interviews. (A129) The district judge also admitted that he was influenced by an old photograph he saw of Bill Gates (whom he described as a "'smart-mouthed young kid'") and the founding group of Microsoft employees. (A124) That photograph, of course, was not part of the record.

cannot be reconciled with *Cooley* and *Preston*. Because the courts of appeals obviously are exercising their discretion in vastly different ways in determining the appropriate remedy for violations of Section 455(a), this Court should grant review to clarify the standard.

4. It is impossible to determine from the record whether the district judge was biased. Respondents emphasize that the court of appeals reviewed the record and discerned no evidence of actual bias. DOJ Opp'n at 21; States Opp'n at 7. No comfort, however, can be taken from that review. As respondents admit, because the district judge concealed his misconduct until entry of judgment, the facts relating to his violations of Section 455(a) are not part of the evidentiary record. DOJ Opp'n at 6; States Opp'n at 5. Nor were the judge's secret conversations with reporters transcribed. As a result, a review of the record in this case is of little value in assessing actual bias.

Given the absence of a trial record, unlike "many cases," the court of appeals was not in a "better position to evaluate the significance of [the] violation[s] than is this Court." *Liljeberg*, 486 U.S. at 862. In any event, the court of appeals held that the violations of Section 455(a) were highly significant.

5. The number of findings of fact challenged by Microsoft on appeal is irrelevant. Under the clearly erroneous rule, factfindings must be sustained "[i]f the district court's account of the evidence is *plausible* in light of the record viewed in its entirety." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (emphasis added). As a result, factfindings can be wrong and yet not clearly erroneous. *See United States* v. *Forness*, 125 F.2d 928, 942 (2d Cir.) (decision based on "'wrong' facts" is "not subject to correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous'"), *cert. denied*, 316 U.S. 694 (1941). Recognizing the heavy burden it faced, Microsoft challenged as clearly erroneous

only those findings that were crucial to its legal arguments. (A34-35, A43-44) At the same time, Microsoft challenged the validity of all of the judge's findings based on his gross misconduct and the appearance of partiality it created. That the judge's findings received "substantial deference" (A137) on appeal—a deference that assumes impartiality—can only erode public confidence in the judicial system.

6. Microsoft should not be disadvantaged because the district judge deliberately concealed his misconduct. Respondents concede that the district judge began giving secret interviews to the press at least two months before issuing his findings of fact. DOJ Opp'n at 6 n.2; States Opp'n at 5. They argue, however, that "the judge's reported statements during those interviews were restrained." DOJ Opp'n at 22.[3] Their assertion (*id.* at 23 n.12) that the district judge's early interviews taken alone did not violate Section 455(a) cannot be reconciled with *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001). There, the First Circuit disqualified a judge for being quoted in a newspaper as saying that plaintiffs' case was "more complex" than another case. *Id.* at 166. Here, the district judge's comments were far more objectionable: two months before issuing his findings of fact and six months before issuing his conclusions of law, the judge expressed "his distaste for the defense of technological integration—one of the central issues in the lawsuit." (A122) Microsoft should not be put in

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[3] It is impossible in fact or in the public's perception to isolate the judge's early interviews from his later statements to reporters, which were openly hostile to Microsoft. The early interviews were plainly the beginning of a sustained and methodical press campaign. The ground rules for interviews remained the same throughout: secret meetings in chambers, free and open discussion of the merits of the case and a pledge of silence until entry of judgment. Indeed, it is the programmatic quality of the violations that is so shocking here, as opposed to the discrete and limited public comments at issue in other cases.

a worse position than the *Boston's Children* plaintiffs because the district judge concealed his statements to the press, thus depriving Microsoft of the opportunity to make a disqualification motion prior to issuance of the findings of fact.

7. This Court should not permit the findings of fact to stand simply because a retrial would involve substantial costs. Respondents concede that there will be substantial proceedings on remand in any event. DOJ Opp'n at 10 & n.3; States Opp'n at 19. Further, the decisions they cite (DOJ Opp'n at 20-21) in support of their assertion that the cost of retrial is an important factor here are all readily distinguishable. In *United States* v. *Cerceda*, 172 F.3d 806, 814 (11th Cir. 1999), the violation "was neither egregious nor clear to the judge." Here, "[t]he violations were deliberate, repeated, egregious, and flagrant." (A119) In *School Asbestos Litigation*, the disqualified judge's prior rulings either were subject to plenary review on appeal or could be reconsidered by the new trial judge. *See* 977 F.2d at 787-88. Here, the district judge's findings of fact were given "substantial deference" on appeal. (A136-39) And, in *In re Allied Signal Inc.*, 891 F.2d 967, 971-72 (1st Cir. 1989), there was *no* violation of Section 455(a). Here, the violations were flagrant and legion. (A130-34) Those cases thus provide no support for the court of appeals' decision not to vacate the findings of fact.

8. A more stringent remedy is necessary to deter similar violations and to protect public confidence in the judicial process. Respondents assert that the court of appeals' remedy and "sharp chastisement for the judge's misconduct" are sufficient to deter future misconduct and to restore public confidence in the integrity of the judiciary. DOJ Opp'n at 24. Yet the court of appeals had previously admonished the same district judge for making improper extrajudicial statements about a case pending before him. *See In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991). As one commentator observed, "[t]he remedy of reversal should be more likely in the situation where an appellate court has

already warned the judge not to engage in such extrajudicial comments." Rotunda, *supra*, 2001 U. ILL. L. REV. at 627. The district judge here also "continued to engage in extra-judicial comments, even after commentators openly questioned his series of interviews." *Id.* The deliberate and brazen nature of the judicial misconduct in this case calls for the most stringent remedy.

Respondents do not dispute the importance of this case or the intense public attention it has received. Yet they attempt to downplay the adverse consequences of the district judge's flagrant violations of Section 455(a), which the court of appeals found undermined public confidence in the integrity of the judiciary (A130).[4] As this Court observed in *Liljeberg*, "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." 486 U.S. at 864-65. Congress thus enacted Section 455(a) "to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355; *accord* S. REP. NO. 93-419, at 5 (1973). In determining the appropriate remedy for a violation of Section 455(a), "'[t]he guiding consideration is that the administration of justice should reasonably appear disinterested as well as be so in fact.'" *Liljeberg*, 486 U.S. at 869-70 (quoting *Pub. Utils. Comm'n of D.C.* v. *Pollak*, 343 U.S. 451, 466-67 (1952)

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[4] Respondents argue that Microsoft's references to specific statements made at oral argument concerning the district judges' misconduct are inappropriate. DOJ Opp'n at 24 n.13. The oral argument was broadcast on C-SPAN, and many of the judges' remarks were quoted in leading newspapers. The judges' harsh condemnation at oral argument of the district judge's misconduct is thus highly relevant to the public's perception of whether Microsoft received a fair trial before an impartial adjudicator.

(Frankfurter, J., in chambers)). As the institution with ultimate supervisory responsibility for the federal courts, this Court should be vigilant in safeguarding the public's confidence in the federal judiciary. *See* WLF & AEF Br. at 5-6, 14-16. The only way to restore such confidence here is to disqualify the district judge as of the date of his earliest-known violation of Section 455(a) and thus vacate his findings of fact and conclusions of law.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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